IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No. _____

FLORENCE E. SMITH,
Administratrix of the Estate of
ROBERT SMITH, deceased,

Petitioner,

vs.

SOUTHERN PACIFIC CO.,
a corporation,

Respondent.

PETITION FOR WRIT
OF CERTIORARI
(To the Court of Appeal of the State
of California, First Appellate District,
Division Three)

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PETITION FOR WRIT
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(To the Court of Appeal of the State
of California, First Appellate District,
Division Three)

The petitioner, plaintiff-appellant Florence E. Smith, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, First Appellate District, Division Three, which judgment and opinion became final upon denial of a hearing by the California Supreme Court on December 23, 1971.

a. Opinions Below

The California Supreme Court did not render any opinion, upon denial of petitioner's Petition for a Hearing. A copy of said denial by the California Supreme Court is annexed hereto as Appendix A. A copy of the opinion of the Court of Appeal of the State of California, certified for non-publication, is annexed hereto as Appendix B. A copy of the opinion and order of the trial court, the Superior Court of the State of California in and for the County of San Francisco, is annexed herein as Appendix C. A Petition for Rehearing was made to the California Court of Appeal, First Appellate District, Division Three, which was denied on November 15, 1971, without modification of the opinion of said Court. A copy of said denial is annexed hereto as Appendix D. None of the foregoing opinions are published in any official or unofficial reports.

b. Grounds of Jurisdiction of This Court

i. The order of the California Supreme Court denying petitioner's Petition for Hearing, copy of which is annexed hereto as Appendix A, was filed December 23, 1971. The California Supreme Court has discretion as to whether or not to hear such petitions.

California Constitution, Article 6, §12. Upon denial by the California Supreme Court of the Petition for Hearing, the judgment of the California Court of Appeal became the final judgment of the highest Court of California in which a judgment or decision could be had. Where a Petition for Hearing is denied by the California Supreme Court, there is no provision permitting a Petition for Rehearing in said Court.

ii. Jurisdiction is invoked under sub-division 3 of 28 U.S.C. §1257, which reads, in pertinent part, as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "* * *
>
> "(3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . or statutes of . . . the United States."

As pointed out above, the final action of the State Courts was the filing of the denial of hearing by the California Supreme Court on December 23, 1971 (Appendix A), and this petition was filed within 90 days of that date. 28 U.S.C. §2101(c).

c. Questions Presented for Review

1. In an action under the Federal Employers Liability Act, 45 U.S.C. §§51, et seq., may the verdict of the jury be set aside, and a judgment notwithstanding the verdict granted to the defendant railroad where there was substantial evidence that defendant was negligent in exposing its employee to harm from negligent third-parties and where there was substantial evidence that the exposure of said employee could feasibly have been avoided?

2. In such an action, was the California Court of Appeal correct in holding that, as a matter of law, it was not "particularly hazardous" (Appendix B at p. 6) for defendant to require its employees to walk continuously back and forth, in the dark of night, across a poorly lit public street and highway open for vehicular traffic? Was not the question of hazard one peculiarly for resolution by the jury in an action under the Federal Employers Liability Act?

3. In such an action, was the California Court of Appeal correct in holding that, as a matter of law, the defendant railroad was not negligent in failing to take feasible steps to eliminate the need to cross said street and in failing to furnish, or require equipment that would have made its employees more visible to third

party motorists?

4. Under the Federal Employers Liability Act, was the State Courts' action in depriving plaintiff of a jury trial proper and correct?

5. In an action under the Federal Employers Liability Act, may the trial court order a new trial by application of the state criteria for granting such a new trial, or does the federal criteria apply in determining when a jury verdict may be set aside and a new trial granted?[1]

d. Statutory Provisions Involved

The statutory provision involved is 45 U.S.C. §51. Jurisdiction of the federal

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[1] As will be seen, this question was deemed moot by the California Court of Appeal, because the judgment notwithstanding the verdict was held properly granted. Under California practice, an order granting a new trial is an appealable order (California Code of Civil Procedure §904.1 [d]), and, as such, becomes final if not appealed from immediately. See California Code of Civil Procedure §906.

claim by the State Courts is provided in 45 U.S.C. §56. The text of said provisions is set forth in Appendix E.

STATEMENT OF THE CASE

As noted, this action was brought by petitioner under the Federal Employers Liability Act, 45 U.S.C. §§51, et seq., and the federal question involved herein was raised in the complaint (Cl. Tr. 1-7), copy of which is annexed hereto as Appendix F (see Appendix F at p. 4), and in all of the subsequent proceedings. The opinions of the Court of Appeal and of the trial court, Appendices B and C respectively, similarly establish that the sole questions involved herein are with respect to the proper and uniform interpretation and application of the aforesaid statutes of the United States.

Petitioner is the administratrix of the Estate of Robert Smith. Mr. Smith was killed during the course of his employment with defendant railroad (e.g., Opinion of California Court of Appeal, Appendix B, pp. 1-2). The jury herein, by an 11-1 vote (Rep. Tr. 405-406), returned a verdict in favor of petitioner in the sum of $50,000.00 (Rep. Tr. 404). The trial court, on motion of defendant-respondent Southern Pacific Co. (Cl. Tr. 152), granted said defendant a judgment notwithstanding the verdict (Cl. Tr. 167-170; Appendix C). In addition, the trial

court granted said defendant a new trial in the alternative; in the event that the order granting the judgment notwithstanding the verdict would be held erroneous by a reviewing court (Appendix C).

The California Court of Appeal, First Appellate District, Division Three, affirmed the judgment notwithstanding the verdict and dismissed petitioner's appeal from the order granting the new trial as moot (Appendix B at p. 7). Petitioner thereupon petitioned the Supreme Court of California for a hearing. Said Petition was denied, as above noted, without opinion (Appendix A).[2]

---

[2] A denial of a petition for hearing by the California Supreme Court does not necessarily operate as an adjudication that the petition was not meritorious. The California Supreme Court has complete discretion with respect to hearing civil cases, as noted above, and often denies hearings in meritorious cases. See, e. g., Scala v. Jerry Witt and Sons, 3 Cal. 3d 359, 370 (1970), disapproving some 6 prior recent California Court of Appeal cases in which hearings had previously been denied the California Supreme Court. See the following disapproved cases (cited in Scala at footnote 1, 3 Cal. 3d at p. 364; their disapproval noted at p. 370), Matlock v. Farmers Mercantile Co., 258 Cal. App. 2d 362 (1968); Kincaid v. Sears, Roebuck & Co., 259 Cal. App. 2d 733 (1968); Hayes v. Long Beach Banana Distr., Inc.,

The evidence adduced at the trial established that Mr. Smith, petitioner's decedent, was a switchman (Rep. Tr. 25) and the engine foreman in charge of a crew of four working for defendant on the midnight shift on April 12, 1966 (Rep. Tr. 39, 65. See also Opinion of California Court of Appeal, Appendix B at p. 2). The crew's duties that night consisted of picking up and delivering freight cars from and to various "side industries" whose tracks connected with the railroad tracks (Rep. Tr. 61, 62, 72, 76, 85, 91). In connection with these duties, defendant required its employees to jaywalk continuously back and forth across the public street (Rep. Tr. 64, 76, 85, 90, 91).

Shortly prior to Mr. Smith's death, he and his crew had commenced to service the American Can Company, which was located on Alameda Street in Oakland, California. Alameda Street was a long industrial street, with no intersections or cross-walks in the immediate area (see Exhibits 2, 3 and A). The night was dark, the street lighting was poor, and it was raining (Rep. Tr. 41, 42, 43,

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[2] (Continued from previous page.)

270 Cal. App. 2d 658 (1969); Russell v. Nelson, 1 Cal. App. 3d 919 (1969); Schultz v. Mathias, 3 Cal. App. 3d 904; Stauek v. Kohrs, 8 Cal. App. 3d 283 (1970). In all of these cases, the California Supreme Court denied hearings.

296, 301). In conjunction with his duties, Mr. Smith was required by defendant to jaywalk across Alameda Street at that point, in the dark, rainy night (Rep. Tr. 40, 41). He was required to walk across in order to open gates on the American Can Company property or to use a telephone located on said property. (Opinion of the California Court of Appeal, Appendix B, p. 3; Rep. Tr. 40, 41, 64). This requirement could have been eliminated had defendant required American Can Company to have its own employees open the gates and had defendant required that the telephone be relocated (Opinion of the California Court of Appeal, Appendix B, p. 6; Rep. Tr. 40, 57, 59-62, 78, 86, 100, 131, 168, 219-220). Defendant had notice that the situation was dangerous, since there were "employee complaints regarding the danger and frequent accidents in the area." (Opinion of the California Court of Appeal, Appendix B, at p. 5. See also Rep. Tr. 111-112, 138-140, 170-173.)[3]

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[3]The trial court refused to admit the proffered evidence of frequent accidents. This evidence showed that, prior to the accident in suit, there were 34 reported accidents in that area involving defendant's trains and motor vehicles (Rep. Tr. 170-173, 176). We believe it was error to refuse this testimony, and the California Court of Appeal appears to have accepted the proffered testimony, but ruled that, in spite of it, no cause of action was established.

Nevertheless, defendant concededly did nothing to eliminate the necessity of making these crossings. Nor did it furnish or require any type of equipment or gear to illuminate the employee or the crossing (Rep. Tr. 46-49, 111, 136, 138).

As a result, while jaywalking across this long, dark, rainswept street, at about 4:00 a.m. on April 12, 1966, Mr. Smith was struck and killed by an automobile being driven by Mrs. Trudy Coker (nee Baldez) (Rep. Tr. 44-45, 286-290; Appendix B at p. 3).

The manner in which Mrs. Coker was driving is described in the Opinion of the California Court of Appeal (Appendix B at pp. 3-4). However, contrary to the Opinion of the Court of Appeal, the evidence does not establish that Mrs. Coker was glancing over her shoulder at the point of her trip which related to the accident (Rep. Tr. 287). Moreover, the evidence establishes that her ability to perceive objects or lights was not in any way impaired (Rep. Tr. 295). The evidence further establishes that, prior to hitting Mr. Smith, Mrs. Coker saw a speck of light in front of her, which could have been either Mr. Smith's lantern or his yellow helmet (Rep. Tr. 295-296, 298-302). She did not understand the significance of this speck of light (ibid). The lantern which Mr. Smith was carrying, in fact, generated only a little speck of colorless light which was of no value in signalling a motorist (Rep. Tr. 192-193, 214). The testimony thus established that had

Mr. Smith been carrying a more visible light, such as a flashlight with a phosphorous wand (Exhibit 12), Mrs. Coker would have seen him and avoided the accident.

As noted above, defendant neither furnished nor required any such equipment. The Court of Appeal incorrectly stated the evidence, in stating that flares were available to Mr. Smith (Appendix B at p. 6). The evidence established that the flares were unavailable and unsuitable because:

1. Respondent's Safety Rules prohibited the use of flares for any purpose "other than that for which they are provided," and they were provided for use only where main train line movements or obstructions were involved. Respondent never authorized them for use in the manner suggested by the above referred to phase of the Opinion of the California Court of Appeal (Rep. Tr. 151, 229, 242-243, 248, 264); and

2. Switchmen were instructed not to give signals, of the type at issue here, with the flares, because of the hazards involved (Rep. Tr. 121, 122, 225-228, 230).

Nor was there any evidence that Mr. Smith had available to him any other means of giving warnings.

The California Court of Appeal found that "the jury could have agreed that S. P. Co. should have eliminated the need to cross the

street." (Appendix B at p. 4. See also Appendix B at p. 6). The California Court of Appeal further found, as noted above, that "there were employee complaints regarding the danger and frequent accidents in the area." (Appendix B at p. 5). Nevertheless, the Court of Appeal found "a complete absence of probative facts that any lack of care of respondent played a part in the death. . . ." (Appendix B at p. 7.) Thus, the Court of Appeal held that, as a matter of law, no danger was created by the failure to eliminate the need to cross the street and that, as a matter of law, "(t)here was no satisfactory evidence that the area was particularly hazardous." (Appendix B at p. 6). The Court of Appeal thus found, in effect, that the negligence of the third party motorist, Mrs. Coker, insulated defendant from liability. (Appendix B at p. 7), despite the fact that under the evidence the jury could have found that Mr. Smith should not have been exposed to such negligence and should not have been directed to work in a manner that required him to regularly jaywalk across the public streets at night.

As we shall now show, the foregoing establishes that the California courts have decided federal questions in a way not in accordance with the applicable decisions of this Court, and have deprived petitioner of her federally-created rights.

REASONS FOR GRANTING THE WRIT

A. The State Courts Herein Have Decided Federal Questions of Substance in a Way Not in Accordance With Applicable Decisions of This Court.

1. The Subsequent Negligent, or Even Reckless or Wilful, Acts of a Third Party, Do Not Insulate a Defendant Under the Federal Employers Liability Act From Liability for Failure to Provide a Safe Place to Work.

It is well-settled that a railroad may be liable for exposing its employees to harm that could only come about through the subsequent intervening negligent, or even criminal, acts of third parties. Lillie v. Thompson, 332 U.S. 459, 68 S.Ct. 140 (1947).

And in the precise situation where a railroad has exposed its employees to the reckless acts of motorists, this Court has repeatedly held that jury questions are presented as to the railroad's liability.

Thus, in Cahill v. New York, New Haven & Hartford Railroad Co., 350 U.S. 898, 76 S.Ct. 180 (1956), rehearing denied, 350 U.S. 943,

76 S. Ct. 300, amended on other grounds, 351 U. S. 183, 76 S. Ct. 758, this Court granted certiorari, and, in the same order, without opinion, reversed the judgment of the Court of Appeals (reported in 224 F. 2d 637 [2nd Cir. 1955]). The Court of Appeals had reversed the judgment in favor of the plaintiff. The facts were as follows: plaintiff, a brakeman employed by defendant, was flagging motor vehicular traffic stopped behind a train standing at a highway crossing. A truck suddenly started up without warning and struck plaintiff.

In Atlantic Coast Railroad Co. v. Small, 348 U. S. 946, 75 S. Ct. 439 (1955), rehearing denied, 349 U. S. 907, 75 S. Ct. 579, this Court similarly granted certiorari and reversed the judgment of the Court of Appeals, without opinion. The Court of Appeals decision (reported in 216 F. 2d 842 [4th Cir. 1954]) had granted a judgment notwithstanding the verdict to defendant railroad on the following facts: plaintiffs, employees of defendant railroad company, were injured by an automobile while standing at a crossing waiting to be picked up by one of the company's passenger trains. The jury found for plaintiffs on the theory that defendant was negligent in failing to provide them a safe place to work in that it had not lighted the crossing at which they were standing (see Opinion of the Court of Appeals, 216 F. 2d at page 843). The Court of Appeals had held that defendant was not guilty of negligence in failing to light the crossing, and that plaintiffs' injuries resulted solely from the negligence of the automobile driver. By its reversal, this

Court rejected this rationale and found that a case establishing defendant railroad's liability for negligence had been made out.

See also:

Eubanks v. Thompson, 334 U.S. 854, 68 S.Ct. 1528, reh. den., 335 U.S. 837, 69 S.Ct. 14 (1948). (Here, too, this Court granted certiorari and, in the same order, without opinion, reversed the judgment of the Arkansas Supreme Court reported in Missouri Pacific Railroad Co. v. Eubanks, 207 S.W. 2d 610 (Ark. 1948). The Arkansas Supreme Court had held that the sole proximate cause of plaintiff's injury was the negligence of an automobile driver who had struck plaintiff as he was standing on a step in front of the train. Plaintiff had signalled the car to stop at the crossing, but the automobile nevertheless ran into him.);

Arnold v. Panhandle & Santa Fe Railway Co., 353 U.S. 360, 77 S.Ct. 840 (1957), reh. den., 354 U.S. 927, 77 S.Ct. 1375, reversing 283 S.W. 2d 303 (Ct. of Civ. App. Tex. 1955).

Inman v. Baltimore and Ohio Railroad Company, 361 U.S. 138, 80 S.Ct. 242 (1959), relied on by respondent in its briefs to the California courts, is not in point. Therein, plaintiff was struck by a negligent motorist while flagging trains. In that case, however,

the railroad had taken extensive precautions to protect plaintiff, had had no notice of similar accidents and had no reasonable means of preventing the injury. At bar, of course, defendant took no precautions to protect Mr. Smith, had notice of the dangerous condition -- both by reason of complaints and by reason of frequent accidents in the area -- and could have prevented the injury by exercising feasible precautions.

2. Under the Decisions of This Court, It Is Clear that a Jury Question Was Presented at Bar.

This Court has made it clear in a number of decisions that the right to a jury trial is "part and parcel of the remedy" under the Federal Employers Liability Act. Dice v. Akron, C. & Y. Railroad Co., 342 U.S. 359, 363, 72 S.Ct. 312 (1951). See also Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, 369 U.S. 355, 82 S.Ct. 780 (1962). Where the proofs justify "with reason, the conclusion . . . that negligence of the employer played any part at all in the injury or death . . . even the slightest" the determination of liability must be that of the jury. Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 506-507, 77 S.Ct. 443 (1957); Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 114-115, 83 S.Ct. 659 (1962). See also: Dennis v. The Denver & R.G.W.R. Co., 375 U.S. 208, 84 S.Ct. 291 (1963); Shenker v. Baltimore & Ohio R. Co.,

374 U.S. 1, 83 S.Ct. 1667 (1963).

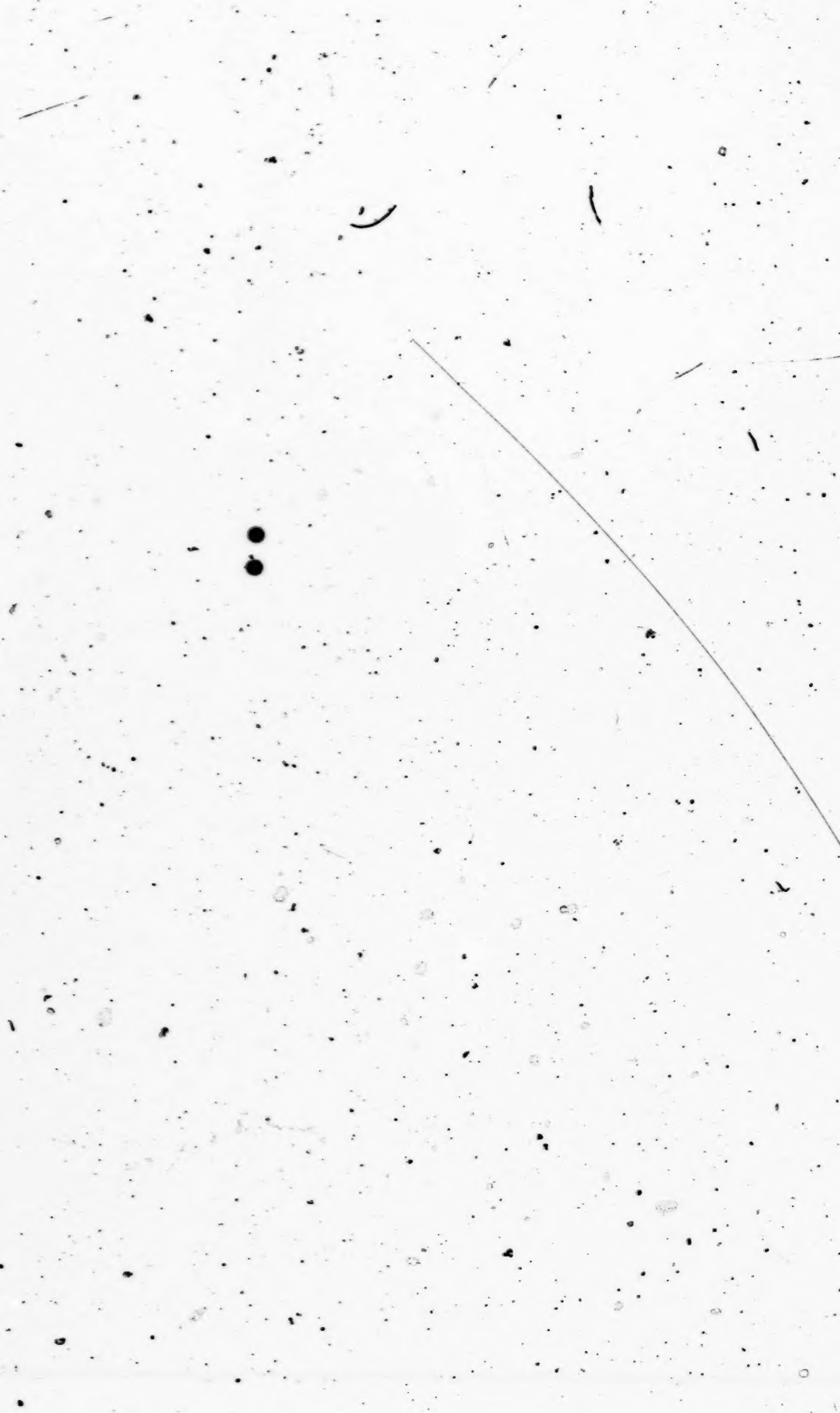
While paying lip service to the foregoing rules (e.g., Appendix B, pp. 4-5), the California courts have, we respectfully submit, failed to follow said rules in the subject case. We respectfully submit that it cannot be said that the jury was unreasonable in concluding that defendant was negligent in requiring its employees to continuously jaywalk back and forth across the public street at night, in the dark, with no equipment affording visibility. And particularly was this conclusion reasonable in view of the previous complaints and frequent accidents in the area in question. We respectfully submit that, in concluding that, as a matter of law, defendant's requirement that its employees work in this manner did not create a danger (Opinion of Court of Appeal, Appendix B at p. 6), and that, as a matter of law, the area where Mr. Smith was struck and killed was not "particularly hazardous" (Opinion of the California Court of Appeal at p. 6), the Court of Appeal has plainly disregarded the well-settled rules laid down by this Court in the cases cited above and many others.

We respectfully submit that the danger that the above-described jaywalking would expose its employees to the negligent, or even reckless, acts of motorists was manifest, and readily foreseeable by defendant. The area in question was dark, and seemingly deserted. It could be foreseen that motorists about at that hour might be drinking, and speeding, and

reckless in other respects.[4] We respectfully submit that defendant's admitted failure to take any precautions whatever to guard against such perils plainly represented questions of fact for resolution by the jury, and that plaintiff has been erroneously deprived of her federally created right to a jury trial herein.

---

[4]Respondent relied heavily in the California courts on two factual matters: (1) that Mrs. Coker allegedly took her eyes off the road and (2) that she was driving without her lights on. As to the first matter, there is no evidence that Mrs. Coker took her eyes off the road at the point of her trip which relates to the accident, except to look through the rear view mirror (see p. 10, supra, Rep. Tr. 287), an action which does not even constitute negligence. As to the second matter, annexed hereto as Appendix G is a list of California cases we have found in which there was evidence that a motorist was driving about in the dark without lights. We therefore respectfully submit that the foreseeability of such activity is for the jury. Moreover, we respectfully submit that it is not necessary that the peculiar facts of the particular accident be foreseeable; the general danger of harm from motorists is all that need be foreseeable, in order for liability to attach. That danger, we respectfully submit, was plainly foreseeable herein.



3. In the Event that This Court Agrees that the Judgment Notwithstanding the Verdict Was Erroneous, the Question of the Propriety of the Order Granting the New Trial Remains.

As we have noted, the Superior Court granted not only a judgment notwithstanding the verdict to defendant, but also, in the alternative, a new trial. We believe that this order was erroneous under federal standards, which should be applied herein.

See:

O'Neil v. W.R. Grace & Co., 410 F.2d 908 (5th Cir. 1969);

Taylor v. Washington Terminal Co., 409 F.2d 145 (D.C. Cir. 1969);

Levin v. Metropolitan Life Authority, 349 F.2d 608, 614-615 (3rd Cir. 1968);

Duncan v. Duncan, 377 F.2d 49, 53-55 (6th Cir. 1967), cert. den., 389 U.S. 913, 88 S.Ct. 239.

We will not burden this Court with an extensive discussion of this issue, since the total deprivation of petitioner's right to a jury trial is the main issue involved herein. However, we respectfully submit that the order

granting the new trial also erroneously deprived petitioner of her rights under the Federal Employers Liability Act. See Harsh v. Illinois Terminal R. Co., 348 U.S. 940, 75 S. Ct. 362 (1954); Bowman v. Illinois C.R. Co., 142 N.E. 2d 104 (Ill. Sup. Ct. 1957), cert. den., 355 U.S. 837.

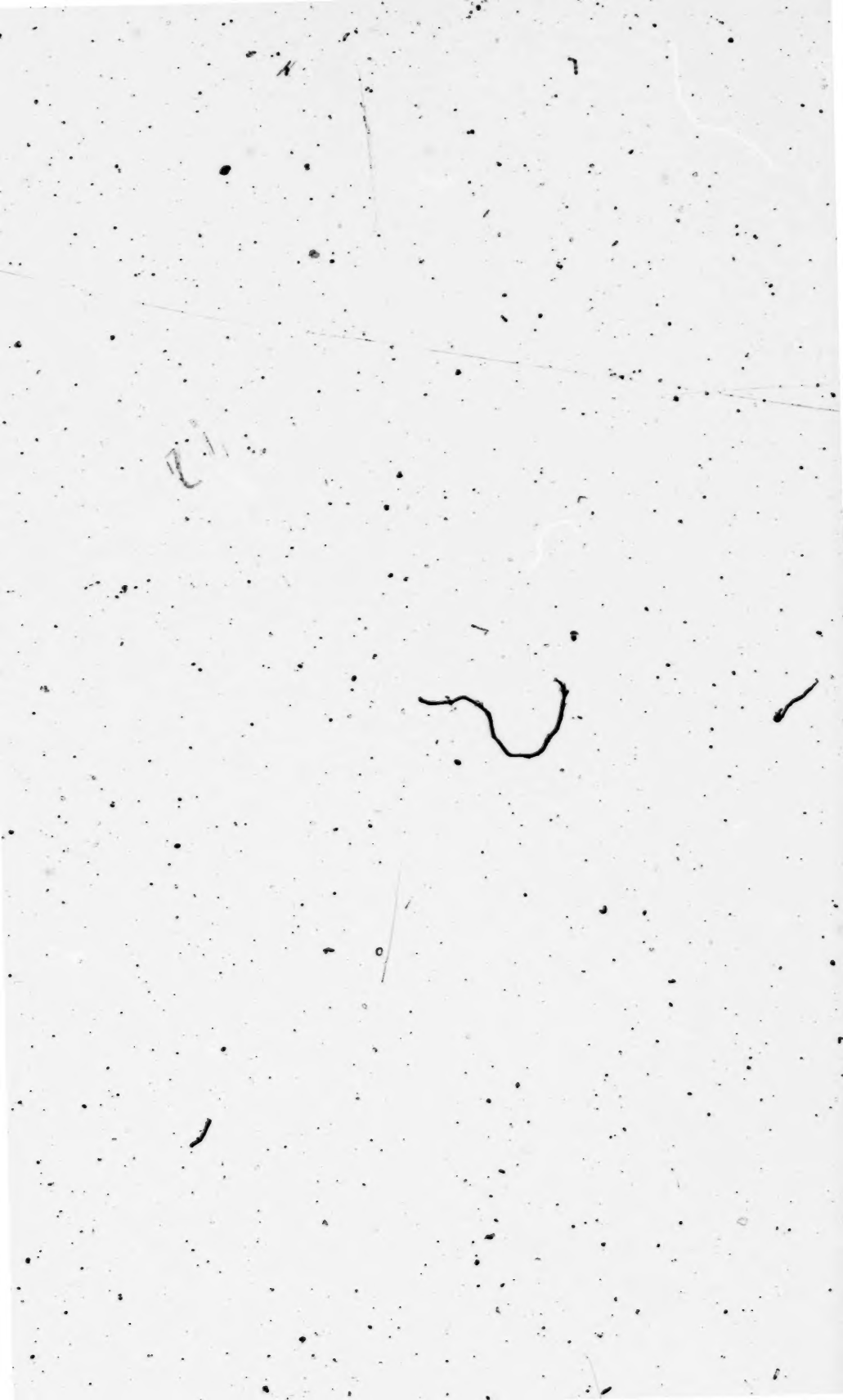
CONCLUSION

The subject Writ should be granted.

Respectfully submitted,

O'CONNOR & SEVEY and
LEONARD SACKS

Attorneys for Petitioner
Florence E. Smith



APPENDIX A

CLERK'S OFFICE SUPREME COURT
4250 State Building

San Francisco, California 94102

Dec. 23, 1971

Dear Sir: I have this day filed Order _____

HEARING DENIED

In re: 1 Civ. No. 27643

Smith

vs.

Southern Pacific Company

Respectfully,

G. E. BISHEL
Clerk

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT,
DIVISION THREE

FILED Oct. 28, 1971
Court of Appeal -
First App. Dist.
By Clifford C. Porter, Clerk
Deputy

FLORENCE E. SMITH, Administratrix of the Estate of Robert Smith, deceased,	) 1 Civil) 27643
Plaintiff and Appellant, vs.	) (Sup. Ct.) No. 573,) 210)
SOUTHERN PACIFIC COMPANY, a corporation,	)
Defendant and Respondent.	)

Plaintiff appeals from a judgment notwithstanding the verdict entered in favor of defendant and from an order granting motion for new trial.

On December 1, 1966, appellant, as administratrix of the estate of Robert Smith, filed an action under the Federal Employers'

Liability Act, 45 U.S.C.A., section 51, et seq., alleging that the deceased had been killed as a result of the negligence of the defendant in failing to furnish deceased with a reasonably safe place to work and reasonably safe and suitable equipment.

The jury returned a verdict for plaintiff in the sum of $50,000 and the trial court granted a motion for judgment notwithstanding the verdict and the order granting motion for a new trial.

The sole issue necessary for consideration on this appeal is whether there is a complete absence of probative facts that negligence of the employer played a part in causing the death for which damages are sought.

The evidence disclosed that on April 12, 1966, at approximately 4:00 a.m., Robert Smith (Smith), a 44-year old switchman employed by the Southern Pacific Company (S.P. Co.) was struck and killed by an automobile while crossing Alameda Street in an industrial part of Oakland.

On the night of the accident, Smith was the foreman of a crew of four. The crew's duties consisted of picking up and delivering freight cars to and from various "side industries" whose tracks connected with the railroad tracks. The industries were located on one side of Alameda Street. The S. P. Co.'s railroad tracks were located on the other side and connecting tracks crossed

Alameda Street.

Although the exact reasons that Smith walked across Alameda Street are unknown, it may be accepted that he was in the course of his employment. He apparently intended to open certain gates of the American Can Company or to use a phone on S. P. Co.'s business. Both activities would come within the duties of his employment. Alameda Street was a long industrial street with no intersections or crosswalks in the immediate area. The night was dark, the street lighting was poor, and it was misty. Smith was wearing a yellow hard hat and was carrying a lighted switchman's lantern. Smith got to a point near the middle of Alameda Street when he was struck by an automobile driven by Mrs. Trudy Bales Coker. Mrs. Coker did not see Smith before she collided with him.

Mrs. Coker at the time of the accident was driving approximately 40-45 miles per hour in a 25-mile per hour zone in an attempt to elude a would-be suitor who was chasing her in his car. In attempting to do so, she had turned out her headlights. She also testified that she was not watching the road consistently during the chase but was glancing over her shoulder and looking into her rear view mirror in an attempt to keep an eye on the car following her.

On the evening in question, Mrs. Coker had been working at her job as a barmaid until

sometime after 2:00 a.m. She had been drinking beer. Although the extent of her drinking was not brought out with certainty, she conceded that she felt the effects of the beer. She felt "[j]ust kind of relaxed; not drunk or not sober, but just relaxed." She was initially charged with felony vehicular manslaughter. Subsequently, the charge was reduced to felony hit-and-run to which she pleaded guilty.

As this case is based upon the Federal Employees' Liability Act, the question of sufficiency of the evidence is controlled by federal law. (Waller v. Southern Pacific Co., 66 Cal.2d 201, 206.)

In Rogers v. Missouri Pacif. R. Co., 352 U.S. 500, the United States Supreme Court laid down the rule that "[j]udicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. . . . The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence. (Emphasis added.)" (Id. at 506-507.)

Appellant points to two ways in which the jury could reasonably have concluded that the employer was negligent. First, the jury could have agreed that S.P. Co. should have eliminated the need to cross the street.

Second, in those instances where Smith necessarily had to cross, S. P. Co. should have provided equipment which would have made the employee crossing the street more visible to traffic, such as a helmet with phosphorous strips, a luminous vest or a flashlight with a phosphorous wand. Appellant also emphasizes that there were employee complaints regarding the danger and frequent accidents in the area.

"The test of negligence in supplying the employee a safe place to work is 'whether reasonable men, examining the circumstances and the likelihood of injury, would have taken those steps necessary to remove the danger.' [Citations.]" (Mortensen v. Southern Pacific Co., 245 Cal. App. 2d 241, 244.)

In Simpson v. Texas and New Orleans Railroad Company, 297 F. 2d 660, the court said: ". . . [T]he plain language of the Federal Employers' Liability Act makes unmistakably clear that it is not a workmen's compensation act but provides relief only for injury or death resulting in whole or in part from the negligence of the employer railroad, . . .

* * * * *

"No decision has been cited, nor have we found any, holding an employer railroad liable under the Act for an injury incurred in the performance of an everyday, ordinary action, such as walking on the street or crossing the street, when the injury results

from the action of some third person. . . ." (Id. at 662.)

Appellant suggests that the danger of crossing the street on foot could have been eliminated by having American Can Employees open the gates and by relocating the phone. We cannot agree, however, that the failure to do so created a danger. There was no satisfactory evidence that the area was particularly hazardous.

Appellant's argument that the railroad company should have furnished additional safety equipment does not find reasonable support under the circumstances here. The equipment suggested by appellant required a light source to be shining on it which would not have benefitted Smith as the car was being driven without lights. Also it was not shown that this suggested light source would be any more visible than the lantern appellant was carrying. The most highly visible piece of equipment mentioned in the case was a flare which was in fact available to appellant had he felt he was in a position which warranted its use.

At the time of the accident, Smith was wearing a "bright yellow" hard hat, was carrying a railroad lantern that was used for railroad signalling for distances up to one mile. Smith was the engine foreman on the train switching detail and he, undoubtedly, could have provided warning lights, flares, etc., if there was an exsiting danger.

Here Smith was hit by a motorist driving an automobile far in excess of the state's speed limits, while under the influence of alcohol, in the dark of night with the headlights of her vehicle turned off. Further, Mrs. Coker believed she was looking in the rear view mirror at the moment of impact. Under these circumstances, she would not have seen Smith regardless of his clothing or what he was carrying.

We have determined that appellant has not met the burden of proving that the street where deceased was walking was an unsafe place to work. [illegible]han v. Baltimore Ohio R. Co., 361 U.S. [illegible] We believe that the trial court was justified in concluding that the sole cause of the accident in question was the negligent driving of the vehicle by Mrs. Coker and that there is a complete absence of probative facts that any lack of care of respondent played a part in the death for which damages are sought.

The judgment notwithstanding the verdict is affirmed. The appeal from the order granting a new trial is dismissed as moot. (Code Civ. Proc., § 629; Kaake v. Lott, 252 Cal. App. 2d 895, 901.)

CERTIFIED FOR NONPUBLICATION

Brown (H. C.), J.

We concur:

Draper, P. J.

Caldecott, J.

APPENDIX C

(Title of Court and Cause)

"F I L E D
JUN 6 1969
MARTIN MONGAN, CLERK
By: James J. O'Connor,
Deputy Clerk."

ORDER GRANTING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND MOTION FOR NEW TRIAL

Defendant's motion for judgment notwithstanding verdict granted.

Defendant's motion for new trial granted upon the ground of insufficiency of evidence to support the verdict.

For the purpose of fulfilling the requirements of Section 657 CCP requiring a statement of the reasons for the Court's granting of said motion, the Court has already indicated by granting defendant's motion for judgment notwithstanding the verdict that as a matter of law there is no evidence in the case which would support a finding of negligence on the part of defendant Southern Pacific Company.

While the evidence is virtually uncontradicted, it fails to show that Southern Pacific Company failed to do or did anything constituting negligence which was a proximate cause of the death of decedent. The evidence discloses that decedent, a 44-year-old engine foreman in charge of a switching operation,

while crossing Alameda Street in Oakland, California, was struck by an automobile driven by a Miss Trudy Baldez.

Inferentially, Plaintiff's purpose in crossing the street from the evidence was either to open a gate on the premises of American Can Company to pick up a switch list or to telephone a burglar alarm company on a special phone located at the company gates.

While crossing the street carrying a lighted switching lantern, he was struck by the automobile being driven by Miss Baldez who was driving at a speed estimated at between 40 and 60 miles per hour in a 25-mile zone. Miss Baldez had been drinking and while perhaps not intoxicated admitted that she felt the effects of the alcoholic beverages consumed. Additionally, the evidence is that she was driving at 4:00 A. M. on a dark and misty morning and at the time of the accident was driving with her lights out because she was being pursued by a boy-friend who was driving another vehicle, whom she was trying to avoid. Miss Baldez further testified that she did not see the decedent before he was struck by her vehicle and additionally testified that she turned around while driving to determine whether her suitor was still following in his automobile.

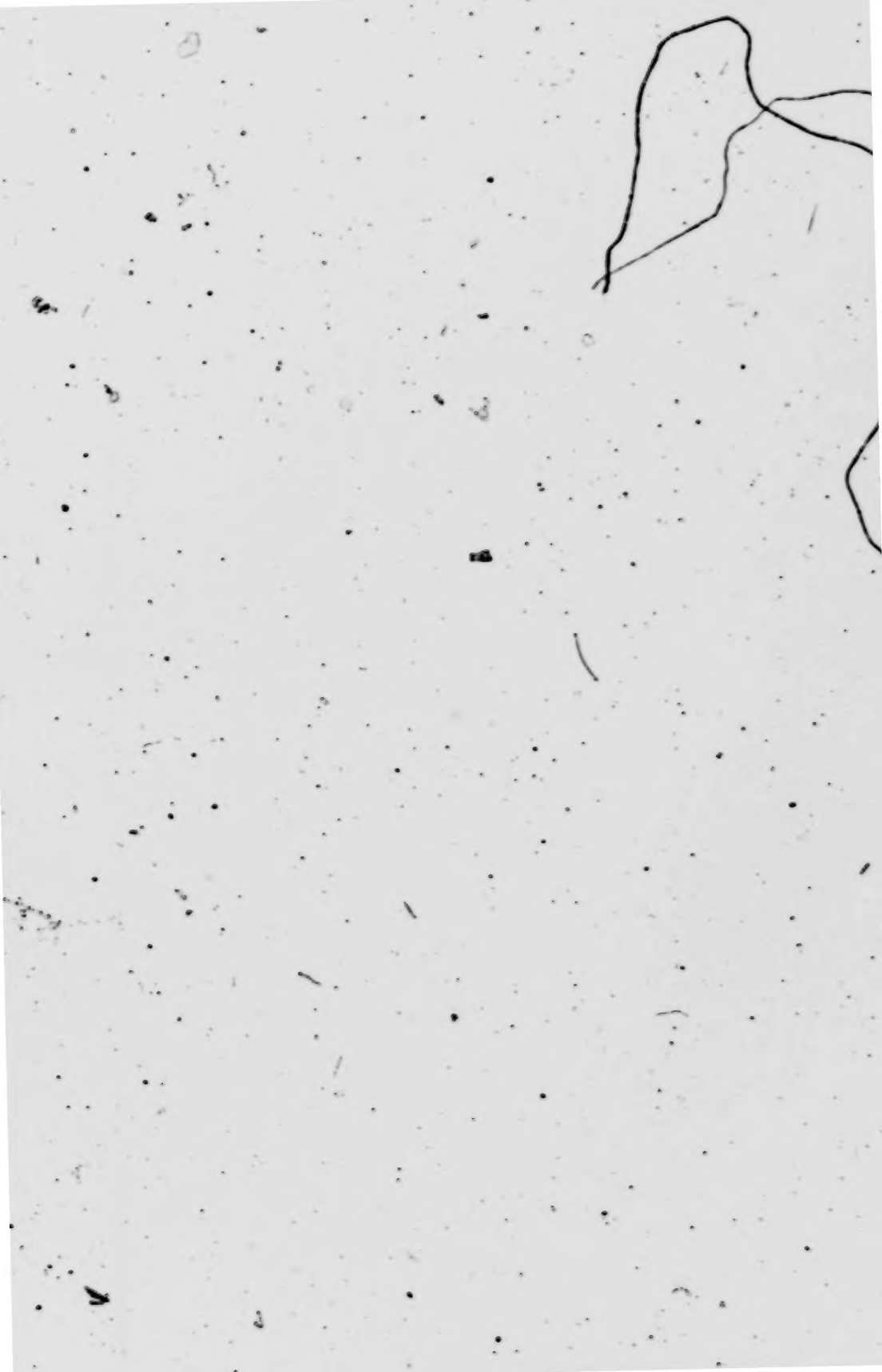
Therefore, in the opinion of the Court the evidence clearly establishes the negligence of Miss Baldez as being the sole proximate cause of the accident. Despite plaintiff's

evidence concerning alternative methods, warning devices, etc., there is no evidence of any negligence on the part of Southern Pacific Company which was a proximate cause of the accident. The record here indicates that plaintiff's death was caused by the negligent conduct of the driver of an automobile and possibly contributed to by the conduct of the deceased. To require defendant to shield decedent from ordinary traffic hazards in crossing a public street would require it to be an insurer of his safety rather than liable upon the basis of negligence.

While it is true that plaintiff has made no motion for new trial on the ground of inadequacy of damages, the decedent in this case was 44 years of age with a life expectancy of 28 years and earning apparently $8,000 per year. The evidence of contributory negligence on the part of decedent is entirely circumstantial and very slight. Manifestly, an award of $50,000 in the event that there is liability is grossly inadequate.

DATED: June 6, 1969.

/s/ Charles S. Peery
JUDGE OF THE
SUPERIOR COURT



APPENDIX D

FILED
Nov. 15, 1971
Court of Appeal-First App. Dist.
By Clifford C. Porter, Clerk
Deputy

COURT OF APPEAL OF THE STATE
OF CALIFORNIA

In and For the

FIRST APPELLATE DISTRICT

Division THREE

Florence E. Smith, etc.,
Plaintiff and Appellant,

vs. No. 27643

Southern Pacific Co.,
Defendant and Respondent.

BY THE COURT:

The Petition for a Rehearing filed in the above-entitled cause is hereby denied.

Dated Nov. 15, 1971

DRAPER, P.J. P.J.

APPENDIX E

45 U.S.C. §51

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed

by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

45 U.S.C. §56

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

APPENDIX F

(Title of Court and Cause)

"INDEXED PLFF
INDEXED DEFT
REGISTERED
ASSIGNED TO DEPT. 18
APR 21 1969
O'Day, Presiding Judge."

"F I L E D
DEC 1 1966
MARTIN MONGAN,
CLERK
By: D. E. Dunn,
Deputy Clerk."

COMPLAINT FOR WRONGFUL DEATH AND DAMAGES

Plaintiff, FLORENCE E. SMITH, as Administratrix of the Estate of ROBERT SMITH, deceased, complains of defendants, and each of them, and for a first cause of action alleges:

I

That said ROBERT SMITH, deceased, died intestate on the 12th day of April, 1966, in the County of Alameda, State of California, in the manner hereinafter alleged, and at the time of his death he was a resident of the County of Alameda, State of California.

II

That the Superior Court of the State of California, in and for the County of Alameda, by its Order on the 27th day of September, 1966,

duly appointed plaintiff as the Administratrix of the Estate of ROBERT SMITH, deceased; that plaintiff duly qualified as the Administratrix and Letters of Administration were issued out of said Court on the 12th day of September, 1966, and that plaintiff ever since and now is the duly qualified and acting Administratrix of the Estate of ROBERT SMITH, deceased.

III

That said ROBERT SMITH, deceased, left surviving him the following persons who are his only heirs at law: FLORENCE E. SMITH, his wife at the time of his death; ROBERT SMITH, his son, BONNIE SMITH, his daughter, both of said children being minors at the time of the death of ROBERT SMITH. That this action is brought for the benefit of these heirs by the personal representative duly appointed.

IV

That the true names or capacities, whether individual, corporate, associate or otherwise, of defendants DOE ONE through DOE THREE are unknown to plaintiff, who therefore sues said defendants by such fictitious names. Plaintiff is informed and believes, and thereon alleges, that each of the defendants designated herein as a "DOE" is negligently responsible in some manner for the events and happenings herein referred to, and negligently caused injuries and damages proximately thereby, as

herein alleged, and plaintiff will ask that when the true names of said defendants are ascertained, that this complaint may be amended to insert the true names of said defendants, together with appropriate charging allegations.

V

That at all times herein mentioned, defendants DOE ONE through DOE THREE were the agents and employees of each of the remaining defendants, and were at all times mentioned herein acting within the purpose and scope of said agency and employment. That at all times herein mentioned, defendant, SOUTHERN PACIFIC COMPANY, was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and that said defendant at all times herein mentioned was and now is engaged in the business of a common carrier by railroad in interstate commerce in the City of Alameda, County of Alameda, State of California.

VI

That at all times herein mentioned, defendant was a common carrier by railroad engaged in interstate commerce, and ROBERT SMITH was employed by defendant in such interstate commerce, and the injuries sustained by him, as hereinafter complained of, arose in the course of and while ROBERT SMITH and defendant were engaged in the conduct of

such interstate commerce.

VII

That this action is brought under and by virtue of the provisions of the Federal Employer's Liability Act, 45 U. S. C. A., Section 51, et seq.

VIII

That on or about the 12th day of April, 1966, at or about the hour of 4:00 o'clock a. m., decedent was employed by the defendant as a switchman performing the duties required by a member of a switching crew on a public street and highway, to wit, Alameda Street between east 8th Street and Fruitvale Avenue, in the City of Oakland, County of Alameda, State of California.

IX

That at said time and place, defendant owed to the deceased the duty of use ordinary care to furnish him with a reasonably safe place in which to perform his work; the duty to exercise ordinary care to supply him with reasonably safe and suitable equipment; the duty to provide reasonably sufficient and competent help to perform the task assigned to him; the duty to enact and enforce the rules to enable the deceased to accomplish the task assigned to him; the duty to warn the deceased of dangerous work procedures and conditions;

the duty to instruct the deceased in the method and manner in performing the work required of him; the duty to warn the deceased of the unsafe nature of the task required of him to be performed; the duty to provide the deceased with adequate safety equipment with which to perform the task assigned; the duty to provide reasonably safe switching procedures; and the duty to provide reasonably safe lighting conditions at the place of work.

X

That the defendants knew, or should have known, in the exercise of reasonable care that said public highway and place of work at said time and place constituted a highly dangerous and unsafe place in which to work, and the said defendant knew or should have known that said public highway was devoted almost exclusively to the use of vehicular traffic; that the defendants, and each of them, knew that the place of work then and there occupied by the deceased constituted a highly dangerous and unsafe place in which to work; that said place to work included danger to the deceased's physical person as well as to the defendant's railroad property and equipment; that the defendants knew or should have known that said place of work exposed the deceased to the extreme danger of being injured and/or killed by the lawful or unlawful operation of motor vehicles along and upon said public highway at said time and place.

XI

That by reason of the negligence of the defendant in violating the duties hereinabove set forth in whole or in part and at the time and place herein mentioned, to wit: When the deceased was attempting to cross said public street and highway in the City of Oakland, County of Alameda, State of California, and in the performance of his duties the deceased was caused to be mortally wounded as a result of being struck by a motor vehicle operated along and upon said public highway where said deceased was performing his work.

XII

That at the time and place aforesaid mentioned, the decedent's death was caused in whole or in part by the negligence of the defendant as hereinabove set forth. That by reason of these premises the plaintiff has been damaged generally in the sum of $500,000.00.

WHEREFORE, plaintiff prays judgment as hereinafter set forth . . .

COMES NOW THE PLAINTIFF, FLORENCE E. SMITH, AS ADMINISTRATRIX OF THE ESTATE OF ROBERT SMITH, DECEASED, AND COMPLAINS OF THE DEFENDANTS, AND EACH OF THEM, AND FOR A SECOND CAUSE OF ACTION ALLEGES

I

Plaintiff hereby refers to paragraphs I. through XII inclusive of the first cause of action and by such reference incorporates the allegations of said paragraphs herein with the same force and effect as though said paragraphs were herein again set forth in full.

II

That as a result of the injuries inflicted upon the deceased at or about the hour of approximately 4:00 o'clock a. m., on or about the 12th day of April, 1966, the deceased suffered severe conscious pain and suffering prior to the time of his actual demise on said day, month, and year.

III

That by reason of these premises as above set forth, the said heirs of the deceased and FLORENCE E. SMITH as Administratrix of the Estate of ROBERT SMITH have been damaged in the sum of $50,000.00 for the conscious pain and suffering endured by the deceased up until the time of his death.

WHEREFORE, plaintiff prays judgment as hereinafter set forth . . .

WHEREFORE, plaintiff prays judgment in her first cause of action against the defendants, and each of them, as follows:

1. For general damges in the sum of $500,000.00;

2. For costs of suit incurred herein; and

3. For such other and further relief as the Court may seem meet and proper.

WHEREFORE, plaintiff prays judgment in her second cause of action against the defendants, and each of them, as follows:

1. For damages in the sum of $50,000.00;

2. For costs of suit incurred herein; and

3. For such other and further relief as the Court may seem meet and proper.

O'CONNOR & LEWIS

By /s/ Leo M. O'Connor
Attorney for Plaintiff

APPENDIX G

Reported California cases in which there was evidence that a driver was driving without his lights on, in conditions of darkness:

Reynolds v. Filomeo, 38 Cal. 2d 5, 10;

Robbiano v. Bovet, 218 Cal. 589, 596-597;

Matlock v. Farmers Mercantile Co., 258 Cal. App. 2d 362, 364;

Newton v. Thomas, 137 Cal. App. 2d 748, 766 (inadequate headlights);

Casalegno v. Leonard, 40 Cal. App. 2d 575, 579;

Linde v. Emmick, 16 Cal. App. 2d 676, 683;

Tieman v. Red Top Cab Co., 117 Cal. App. 40;

Rapolla v. Goulart, 105 Cal. App. 417, 425;

Forrest v. Pickwick Stages System, 101 Cal. App. 426, 434-435;

Fouch v. Werner, 99 Cal. App. 557;

Peatfield v. Pacific Gas Rad. Co., 89 Cal. App. 623 (one light out);

People v. Vasquez, 85 Cal. App. 575;

Greeneich v. Knoll, 73 Cal. App. 1;

Wurl v. Watson, 67 Cal. App. 625.